APPEAL NO. 93410

On April 29, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The issues at the hearing were: 1) whether the appellant (claimant herein) reached maximum medical improvement (MMI), and if so when; and, 2) what is the claimant's impairment rating. The hearing officer determined that the claimant reached MMI on September 8, 1992, as reported by the carrier's doctor, because the claimant had not disputed that MMI certification within 90 days of when he became aware of it, and further determined that the claimant has an eight percent whole body impairment rating as reported by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant states that he disagrees with the hearing officer's decision and contends that he reached MMI on October 2, 1992, with a 16% impairment rating as reported by his treating doctor. The respondent (carrier herein) responds that the hearing officer's findings on MMI and impairment rating are supported by the evidence.

DECISION

The decision of the hearing officer is reversed and remanded for further consideration and development of evidence.

On July 26, 1991, the claimant was injured while working for his employer, T Corporation, when he lifted a refrigerator. He was initially treated by Dr. B, a chiropractor, who diagnosed a cervical sprain/strain and a lumbosacral sprain/strain, and referred the claimant to Dr. R., a neurologist. Dr. R reported that a CT scan of the lumbosacral spine was normal and diagnosed a lumbosacral sprain, cervical sprain, and morbid obesity. Since January 1992, the claimant's treating doctor has been Dr. D. At the request of the carrier, the claimant was examined by Dr. L., on September 8, 1992. Dr. L diagnosed lumbosacral strain and morbid obesity and said that obesity was the claimant's major problem. Dr. L completed a Report of Medical Evaluation (TWCC-69) in which he certified that the claimant reached MMI on September 8, 1992, with a five percent whole body impairment rating. This was the first impairment rating assigned to the claimant for his compensable injury of July 26, 1991. The claimant testified that he received Dr. L's TWCC-69 within seven days of the examination by Dr. L and that he knew when he received the report that Dr. L had certified MMI as of September 8, 1992, and that Dr. L had assigned him a five percent impairment rating. On October 2, 1992, Dr. D, the claimant's treating doctor, completed a TWCC-69 in which he certified that the claimant reached MMI on October 2, 1992, with a 16% whole body impairment rating. He said that the claimant had sustained a severe injury to the lower back which had developed into a chronic lumbar spinal syndrome.

On November 3, 1992, well within 90 days of becoming aware of Dr. L's findings of MMI and impairment rating, the claimant wrote a letter to the Texas Workers' Compensation Commission (Commission) in which he stated that he was disputing how he was "rated" by

Dr. L and he requested the Commission to review "this" and Dr. D's rating and advise the carrier of the Commission's finding. The claimant did not mention MMI in his letter to the Commission. By letter dated December 22, 1992, the Commission informed the claimant and the carrier that the Commission had received notice of a dispute over "maximum medical improvement and/or an assigned impairment rating," and that in order to resolve the dispute the claimant was being ordered to attend a medical examination by Dr. P., on January 4, 1993. The Commission letter indicates that the purpose of the examination is to determine "percentage of impairment only." The parties do not dispute that Dr. P was the designated doctor selected by the Commission.

In a TWCC-69 dated January 4, 1993, Dr. P certified that the claimant reached MMI on January 4, 1993, with an eight percent whole body impairment rating. Attached to the TWCC-69 is a copy of what appears to be Figure 83c (Lumbar Range of Motion) from the AMA Guides to the Evaluation of Permanent Impairment, Third Edition in which results of range of motion testing are recorded. A notation at the bottom of the page states "[d]x: Lumbar pain syndrome: Referring Physician: P." Following that notation are several other notations and then the signature of "D [surname illegible] PT." In a narrative report to the Commission dated January 4, 1993, which is also attached to Dr. P's TWCC-69, Dr. P states that "[t]his is to give you a report on my independent medical examination and impairment rating of [the claimant] on January 4, 1993, and the findings are as listed." After reviewing the history of the claimant's injury and his subsequent medical treatment, Dr. P states:

> On physical examination, the patient is a pleasant, but morbidly obese gentleman in no acute distress. He ambulates without gait pathology. Examination of the lumbar spine reveals tenderness to palpation, but no palpable muscle spasm. Manual muscle testing reveals no focal weakness. Deep tendon reflexes are active and equal bilaterally. Sensation to pin is intact. The straight leg raising test is negative to 90 degrees.

Dr. P then gives a diagnosis of lumbar sprain and states that he agrees that the claimant has reached MMI, and further states that "all are in agreement that the patient has a 5 percent impairment due to unoperated disorders of the spine." He goes on to state that:

> Reviewing Dr. L's notes, Dr. D's notes, evaluation by the physical therapist in my office, and my evaluation reveals consistent limitations only in lateral flexion related to the patient's spine rather than his body habitus. This gives him an additional 3 percent whole person impairment for a total impairment rating of 8 percent.

The claimant unequivocally and repeatedly testified that Dr. P did not give him a physical examination. He said that the physical examination was performed by a physical therapist and that the physical therapist examined his back. He said that he was with Dr.

P for three minutes; that Dr. P asked him about his pain, complaints, weight, and work; and that the only thing Dr. P had him do was "take three steps forward and three steps back and that was all."

On January 5, 1993, the claimant wrote a letter to the Commission requesting a benefit review conference to "dispute the examination and impairment rating of 8% from Dr. P on 1-4-93." In a letter to the Commission dated January 20, 1993, Dr. D reviewed and disagreed with Dr. P's assignment of an eight percent impairment rating and stated that his own rating of 16% was accurate.

The claimant's position at the hearing was that he had reached MMI on October 2, 1992, with a 16% impairment rating as reported by Dr. D, his treating doctor. In disputing the impairment rating assigned by Dr. P, the designated doctor, the claimant urged, among other things, that Dr. P did not give him a physical examination.

The carrier's position at the hearing was that Dr. L's certification of MMI of September 8, 1992, had become final because the claimant "did not dispute that date within 90 days as required by the rules." As for impairment rating, the carrier urged the hearing officer to find that the claimant had an eight percent impairment rating as reported by Dr. P, the designated doctor.

The hearing officer found that the claimant did not dispute Dr. L's certification of MMI within 90 days of the date he had actual knowledge of Dr. L's "evaluation," and concluded that Dr. L's certification that MMI was reached on September 8, 1992, had become final. Although the claimant testified that he was aware of Dr. L's findings within seven days of the examination of September 8, 1992, the hearing officer chose to find that the claimant was aware of Dr. L's certification of MMI "at least by October 2, 1992." The hearing officer further found that the great weight of the other medical evidence is not contrary to Dr. P's assessment of an eight percent impairment rating, and concluded that the claimant has an eight percent impairment rating. The decision of the hearing officer was that the claimant reached MMI on September 8, 1992, with an impairment rating of eight percent. The claimant appeals the hearing officer's decision asserting that he reached MMI on October 2, 1992, with a 16% impairment rating as reported by his treating doctor.

We conclude that the hearing officer erred in concluding that Dr. Lt's MMI certification became final for failure to dispute that certification within 90 days. Tex. W.C. Comm'n, TEX. ADMIN. CODE Sec. 130.5(e) provides that: "The first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." We have previously held that while this rule does not expressly refer to MMI, it would be inconsistent to interpret the rule to bind a claimant or carrier to the percentage of impairment yet allow an "end run" around this finality through the open-ended possibility of an attack on MMI. Texas Workers' Compensation Commission Appeal No. 92670, decided

February 1, 1993. Thus, we held in Appeal No. 92670 that MMI and impairment either became final together, or did not. In Texas Workers' Compensation Commission Appeal No. 93377, decided July 1, 1993, the insurance carrier timely disputed the first impairment rating assigned to the claimant within 90 days, but did not dispute the underlying certification of MMI. The insurance carrier urged that the MMI certification became final because it was not disputed within 90 days. Applying the reasoning of Appeal No. 92670 to the facts in Appeal No. 93377, where only the impairment rating was timely disputed, we held that, if the first impairment rating has not become final because it was timely disputed, then there is no basis to determine that the underlying certification of MMI has become final. In the instant case, the evidence affirmatively shows, and the carrier did not dispute, that the claimant timely disputed the first impairment rating he was assigned; that is, Dr. L assigned him the impairment rating on September 8, 1992, the claimant was aware of the rating by about September 15, 1992, and the claimant disputed that rating on November 3, 1992 in his letter to the Commission. Consequently, in accordance with our holding in Appeal No. 93377, neither the MMI certification nor the impairment rating assigned by Dr. L became final by virtue of Rule 130.5(e).

We are also troubled by the hearing officer's determination that the claimant has an eight percent impairment rating based on the report of the designated doctor, Dr. P, in light of the claimant's unequivocal testimony that a physical therapist, and not Dr. P, gave him an examination. Pursuant to Article 8308-4.26(g) the report of the designated doctor selected by the Commission has presumptive weight and the Commission must base the impairment rating on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. We have held that it is not just equally balancing evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. However, in according presumptive weight to the report of a designated doctor, we cannot overlook the plain language of Article 8308-4.26(g) which states, in part, that "the commission shall direct the employee to be examined by a designated doctor. . . ." In this regard, we are guided by our decision in Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993, wherein we stated:

> It is this latter matter [the claimant's uncontradicted testimony that the designated doctor did not examine him] that concerns us and causes our remand. Clearly, and we have so held, a designated doctor can appropriately consider and rely on tests, exams, data, medical reports, etc. performed by others in arriving at his final evaluation in a given case. *See generally* Texas Workers' Compensation Commission Appeal No. 92275, decided August 11, 1992; Texas Workers' Compensation Commission Appeal No. 92126, decided May 7, 1992. Of course, when he does so, he places his imprimatur on such sources and in considering them either adopts, rejects or distinguishes them for his own evaluation purposes. However, as a part of the very important

> process of certifying MMI and impairment ratings, a designated doctor must himself also examine the injured party and not just review records and totally rely on examinations by others. Articles 8308-4.25 and 4.26 provide in pertinent part that if a dispute exists as to MMI or impairment rating, "the commission shall direct the employee to be examined by a designated doctor." (emphasis added). The commission rules are consistent with the necessity for an examination of the injured employee. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Sec. 130.3 (TWCC Rule 130.3). We have repeatedly noted the important and unique position occupied by the designated doctor under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92555, decided December 2, 1992; Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also stated that where there are problems concerning a report of a designated doctor, the hearing officer can appropriately effectuate corrective action. Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993. We observed "[i]t is essential that the Commission have a designated doctor program that is credible, fair and widely accepted . . ." in Texas Workers' Compensation Commission Appeal No. 93062, decided March 1, 1993. We believe, and conclude the law requires, that a thorough evaluation and appropriate examination is essential to the designated doctor program.

We also recited the content of TWCC Advisory 93-04 in Appeal No. 93095. That advisory states in part that:

> An evaluation or certification under the "Guides" [Guides to the Evaluation of Permanent Impairment, Third Edition, 2nd Printing dated February 1989, published by the American Medical Association] and the Act must include a physical examination and evaluation by the doctor. Although the "Guides" provide that any knowledgeable physician or any other knowledgeable person may compare the clinical findings on a particular patient with the criteria in the "Guides," a doctor must conduct a physical evaluation and is responsible for the integrity of the evaluation process. This means the doctor must evaluate the complete clinical and non-clinical history of the medical condition(s), perform an examination of the injured worker, analyze the medical history with the clinical and laboratory findings, and assess and certify an impairment rating according to the Act, Commission Rules, and the "Guides."

It appears from the evidence of record in this case that an examination of the claimant by Dr. P, the designated doctor, may well not have been performed. Dr. Pdoes refer to an examination of the claimant, but it is unclear from his report whether such examination was performed by him or by a physical therapist (whose range of motion testing results are

attached to the report), or whether examinations were conducted by both Dr. P and the physical therapist. He also refers to "my evaluation," but in view of the claimant's testimony, there remains a question of whether the evaluation included a physical examination of the claimant by the doctor. The hearing officer did not make a finding in regard to whether Dr. P examined the claimant despite the claimant's testimony that he did not. As we held in Appeal No. 93095, this matter needs to be developed in the record and if corrective action is indicated, it must be accomplished. The decision of the hearing officer is reversed and remanded for further consideration not inconsistent with this opinion and for development of evidence as deemed necessary for a proper disposition of this case.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge